YOW FOOK v. WOON KIM TEW

[C. A. (Thomson C.J., Rigby and Neal JJ.) September 14, 1960]

[Ipoh — F.M. Civil Appeal No. 51 of 1960]

Negligence — Absence of evidence to the contrary — Court has to decide on materials the parties put before it — Res ipsa loquitur.

The deceased met her death as a result of injuries which she sustained in a collision between a bicycle which she was riding and a motor-car driven by the respondent. The only material that was put before the Court that was relevant to the question of whether the collision occurred in consequence of the respondent's negligent driving of the car consisted of an admission by himself that he had killed a woman and the evidence of a police Inspector who examined the scene of the accident.

Held: (1) in the absence of anything to the contrary, on consideration of the material before the Court, the accident was the direct result of the motor-car being driven negligently by the respondent;

(2) it was for the respondent to provide some explanation as to how the accident occurred and to negative the allegation of negligent driving. As he had not done so, he must be held liable.

COURT OF APPEAL.

P. P. Dharmananda for the appellant.

G. K. M. Mohan for the respondent.

Thomson C.J. (delivering oral judgment): This action arose out of the death of a woman Chan Yoon Moi which occurred on 2nd September, 1956. The plaintiff is her surviving husband and the administrator of her estate and he sues under the provisions of the Civil Law Ordinance, 1956.

At this stage it can be said that it is abundantly clear that the dead woman met her death as a result of injuries which she sustained in a collision between a bicycle which she was riding and a motor-car belonging to the first defendant and at the material time being driven by the second defendant. In the event the action was dismissed against both defendants and as regards the first defendant that was the end of the matter. As regards the second defendant, however, (that is the driver) the plaintiff has appealed.

Now, the case was an unsatisfactory one and a difficult one for a number of reasons. One of these was that on the evidence there were only two eye-witnesses of what occurred — one of whom was the dead woman, who for obvious reasons could not be called as a witness, and the other was the driver of the car, who for reasons which are, to put it mildly, less obvious, was not in fact called. The only material that was put before the Court that was relevant to the question of whether the collision occurred in consequence of the second defendant's negligent driving of the car consisted of an admission by himself that he had killed a woman and the evidence of a Police Inspector who examined the scene of the incident an hour or so after it occurred and who by way of assisting his memory and illuminating what he had to say had prepared a plan of what he found and had taken a number of photographs, all of which were produced in evidence.

On that material it is not by any means clear what was the behaviour, so to speak, of the bicycle immediately before the collision. It is, however, very clear to my mind what was the behaviour of the motor-car. There were skid marks and the balance of probability was very much in favour of their having been caused by the car. There were scratches on the road way which appear to be made by some metallic object. There were pieces of broken glass. There was a damaged bicycle lying on the side of the road and some distance away there was the motor-car driven by the second defendant on its wrong side of the road and having broken through a very substantial wooden fence.

My own view is, considering these things, looking at the dispositions on the plan, looking at the photographs taken afterwards of the bicycle and of the motor-car and remembering the second defendant's admission that he had killed a woman, that in the absence of anything to the contrary, in the absence of anything further, any prudent man on a consideration of all these things would come to the conclusion that the accident, and of course the death, was the direct result of the motor-car being driven negligently by the second defendant.

I say 'in the absence of anything to the contrary' and the truth is that there was nothing to the contrary. The defendant could have gone into the witness box and given his account of what happened. He might have been able to give an account which was truthful and which was believed and which established some other explanation — some legally speaking innocent explanation — of what occurred. The Court, however, had to decide the matter on such material as the parties saw fit to put before it and in my view that material as it stood pointed, in the absence of any explanation, in one direction and one direction only. For myself then I would allow the appeal with costs.

That brings me to that question of the damages. These, of course, were not dealt with at the trial, and my own view is that they will have to be dealt with on evidence. I would, then, make an order sending the case back to the trial Judge for the assessment of damages.

Rigby J. (delivering oral judgment): I am of the same opinion. I would content myself with saying that, looking at the plan and the photographs produced in evidence as to the final position of the motor-car admittedly driven by the respondent, the bicycle of the deceased woman, the body of the deceased, the skid marks well over on the respondent's wrong side of the road, and the statement made by the respondent to the owner of the car that there had been an accident in which a woman had been killed, on these indisputable and undisputed concrete matters of evidence, there was sufficient evidence to establish the principle of *res ipsa loquitur* that the accident was, *prima facie*, due to the negligent driving of the respondent. The manner in which

the accident occurred was clearly within the knowledge of the respondent and, in my view, the principle of *res ipsa loquitur* having been established, it was for the respondent to provide some explanation as to how the accident had occurred, and to negative the allegation of negligent driving.

I would allow the appeal with costs and remit the case to the learned trial Judge for him to hear evidence upon the issue as to the quantum of damages.

Neal J. concurred.

Appeal allowed.

Solicitors: *Cheang Lee & Ong; Cheah Theam Swee & Co.*

TEJA SINGH v. RATTAN SINGH

[C. A. (Thomson C.J., Rigby and Neal JJ.) September 14, 1960]

[Ipoh — F.M. Civil Appeal No. 54 of 1960]

Moneylending — Account — Non-production of, when originating summons was issued — Moneylenders Ordinance, 1951, s.21.

In this case a moneylender lent $2,000 to the respondent and by way of security took a bill of sale over certain cattle, it being a condition that the cattle should be kept in a specified locality. He alleged that the cattle had been removed from this locality, and he commenced proceedings for the enforcement of his bill of sale. Counsel for the respondent took a preliminary point that the proceedings were bad *ab initio* for want of compliance with a number of provisions of the Moneylenders Ordinance including those of section 21.

Held: non production of the account prescribed by section 21(1) of the Ordinance when the Originating Summons was issued was fatal to any subsequent proceedings on that summons.

Cases referred to:—

(1) *Ramasamy Chettiar* v. *Wong Poh Fatt* [1960] M.L.J. 43.

(2) *Arjan Singh* v. *Hashim Angullia & Ors.* [1941] M.L.J. 55.

COURT OF APPEAL.

Peh Swee Chin for the appellant.

S. A. Lingam for the respondent.

Thomson C.J. (delivering oral judgment): This appellant is a moneylender and it was his case that he lent a sum of $2,000 to the respondent and by way of security took a Bill of Sale over certain cattle, it being a condition that the cattle should be kept in a specified locality somewhere in the neighbourhood of Tanjong Rambutan. He alleged that the cattle had been removed from this locality, although incidentally he omitted to allege that they had been so removed fraudulently, and he commenced proceedings for the enforcement of his Bill of Sale.

These proceedings were proceedings taken by a moneylender for the enforcement of a security taken after the commencement of the Moneylenders Ordinance in respect of money lent. I see no reason to doubt that they fall fairly and squarely within these words which I have read from section 21 of the Ordinance.

The matter was commenced by way of Originating Summons and first of all came before the Judge in Chambers. It was then adjourned into open Court, and whatever the technical position be as regards the rights of the parties it seems to be agreed that both parties had it in mind to tender a certain amount of oral evidence.

When the matter came on in Court, counsel for the moneylender took certain pre iminary points which I do not think it is necessary to deal with here; and then counsel for the victim also took certain preliminary points, one of which was that the whole proceedings were bad *ab initio* for want of compliance with a number of provisions of the Moneylenders Ordinance including those of section 21.

In the event the Judge dealt with these points and without giving the parties any further opportunity to be heard dealt with the matter by dismissing the Originating Summons.

It is against that decision that the appellant has now appealed.

For myself I do not consider it necessary to examine the grounds of appeal in detail. The law in this country is perfectly well-settled and has been settled since as long ago as 1941. It is no case of a moneylender being taken by surprise by a new technical defence. The law has been well known to the moneylending community since 1941 and was discussed as recent y as 1956 in the case of *Ramasamy Chettiar* v. *Wong Poh Fatt*(1) where Pretheroe J., after referring to the decision of Terrell J., in the earlier case of *Arjan Singh* v. *Hashim Angullia & Ors.*(2) held (I am reading from the headnote):—

> "When a moneylender embarks on any proceedings in any Court, a statement of his account as prescribed by section 21(1) of the Moneylenders Ordinance, 1951, must be produced at the time the Originating Summons was filed. Non-compliance with this statutory requirement is an irregularity which the Court cannot waive and will entitle the respondent to have the Originating Summons dismissed with costs."

It is beyond doubt that this case falls clearly within these words. The account was not produced when the Originating Summons was issued and that was fatal to any subsequent proceedings on that summons. In the circumstances I am disposed to go no further than to say that the appeal should be dismissed on that ground with costs. The deposit in Court should be paid out to the respondent against his taxed costs.

Rigby and **Neal JJ.** concurred.

Appeal dismissed.

Solicitors: *Wahab, Singh & Peh; S. A. Lingam.*